

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 21, 2009 Session

STATE OF TENNESSEE v. MICHAEL L. HODGES

Direct Appeal from the Circuit Court for Wilson County
No. 07-0029 John D. Wootten, Jr., Judge

No. M2008-00776-CCA-R3-CD - Filed September 17, 2009

A Wilson County jury convicted the Defendant, Michael L. Hodges, of second offense driving under the influence (“DUI”), violation of the implied consent law, violation of the open container law, and failure to exercise due care. The trial court sentenced him to eleven months and twenty-nine days with seventy-five days to be served in the county jail and the remainder to be served on probation. On appeal, the Defendant contends the trial court erred when it admitted evidence of the field sobriety tests the Defendant performed. After a thorough review of the evidence and relevant authorities, we affirm the trial court’s judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Robert D. MacPherson, Lebanon, Tennessee, for the Appellant, Michael L. Hodges.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; Linda Walls, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the collision of the Defendant’s vehicle with a mailbox on Franklin Road in Wilson County and his subsequent arrest and indictment for driving under the influence (“DUI”) and several related charges. At the Defendant’s trial, the trial court admitted over the Defendant’s objection testimony from the arresting officer about field sobriety tests the Defendant performed. The Defendant now challenges the evidence supporting his conviction, arguing the trial

court erred when it admitted evidence of the field sobriety tests without requiring the State to proffer a foundation for the relevance of such evidence.

At trial, the Defendant testified that he spent the morning and early afternoon of November 24, 2006, performing household repairs. He testified that, between 1:00 p.m. and approximately 4:00 p.m., he drank two beers. About thirty minutes after he finished the second beer, the Defendant drove his truck to Home Depot. Traveling on Franklin Road on his way back from Home Depot, the Defendant began to consume another beer, which, between sips, he held between his legs. The Defendant testified that, about a mile before he came upon the mailbox, he began sneezing. He said that, as he approached the curve in the road on which the mailbox sat, he sneezed violently, which caused him to jerk his head, and his truck suddenly went off the road. He struck an approximately four-foot-tall brick mailbox enclosure located about a foot from the road. The impact knocked several bricks off of the enclosure and left the enclosure lying on its side about two feet away. The Defendant got out of his truck, tossed his partially full beer can on the ground near his truck, and walked toward a house located near the mailbox to inform the homeowner of the accident.

Sandy Bumbalough, the owner of the home whose mailbox the Defendant believed he had struck, testified the Defendant came to her door, told her he had struck her mailbox, and suggested she call police to report the accident. Bumbalough explained that the mailbox actually belonged to the house across the highway. Either Bumbalough's husband or the Defendant then called local police to report the accident. She testified she did not notice the odor of alcohol on the Defendant, and he did not otherwise appear to be intoxicated.

Deputy Steve Gatlin of the Wilson County Sheriff's Department testified that, when he arrived, he saw the Defendant's truck and the damaged mailbox, and he walked up Bumbalough's driveway to speak with the Defendant. The Defendant acknowledged to Deputy Gatlin that he was operating the truck when it struck the mailbox and said he did not sustain any injuries from the wreck. The deputy testified that, during the course of his interactions with the Defendant, he noticed the odor of alcohol on the Defendant. Deputy Gatlin and the Defendant made their way back down the driveway to the location of the accident, and the deputy began to preserve the scene in order for Tennessee State Trooper Raymond Gaskill, who was en route, to complete the investigation.

Trooper Gaskill testified that he soon arrived and took over the investigation. He began to question the Defendant while Deputy Gatlin diverted traffic around the accident scene. The trooper testified the Defendant's speech was slow and slurred, and he, like Deputy Gatlin, noticed the odor of alcohol on the Defendant. The Defendant told Trooper Gaskill he hit the mailbox because he sneezed as he rounded a curve and temporarily lost control of his truck. The Defendant did not report to Trooper Gaskill any injuries from the wreck.

Surveying the scene, the trooper noticed the beer can the Defendant had discarded, and he picked it up. He testified the can was still "cold to the touch." The Defendant admitted to Trooper Gaskill that he drank at least two twenty-four ounce cans of beer earlier in the day and that he threw one partially consumed can to the side of his truck after the accident. With this information, the

trooper determined further inquiry into the Defendant's level of intoxication was appropriate.

Trooper Gaskill testified that he conducted several field sobriety tests on the Defendant. The trooper testified that he had received training on conducting field sobriety tests and that, over the course of his six-year employment as an officer, he had conducted field sobriety tests on approximately ninety individuals. He testified that, according to his training and experience, an impaired person cannot safely operate a vehicle. In order to gauge the extent to which a person's intoxication is interfering with his or her ability to operate a vehicle, he requests the person to perform "field sobriety tests" that involve multiple, simultaneous movements. The trooper testified he also looks for the typical behavior and appearance of an impaired person, such as unsteady balance, slurred speech, and watery eyes.

Trooper Gaskill testified the sobriety field tests he usually employed included the "walk and turn," "one-legged stand," "finger-to-nose," and "horizontal gaze nystagmus" ("HGN") tests. He performed only the first three tests on the Defendant, omitting the HGN test. For each test, he first explained the test, performed it himself, and then asked the Defendant whether he had any physical condition that would interfere with his ability to perform the test. The Defendant responded each time that he had no such interfering physical condition, so the trooper instructed the Defendant to perform each test. Trooper Gaskill first instructed the Defendant to perform the walk and turn test, which requires the subject to take nine steps, placing his heel down directly in front of the opposite leg's toe, turn around, and repeat. The subject is instructed to take the nine steps along either an actual line painted on the road or, if the road near the actual line slopes, along an "imaginary" line parallel to an actual line. Because the road sloped too much near the actual painted lines, the trooper instructed the Defendant to walk along an imaginary line parallel to one of the fog lines on the road, and he observed whether the Defendant stumbled, staggered, raised his hands for balance, or was unable to place his feet where instructed. Trooper Gaskill testified that the Defendant stopped temporarily and stepped four or five inches off the center line between the third and fourth steps, missed the heel to toe connection between the fifth and sixth steps, and took ten, instead of nine, steps on the way back.

Trooper Gaskill next instructed the Defendant to perform the one-legged stand, which requires the subject to stand on one leg, holding the opposite leg approximately six inches off the ground with the toe pointing up, while counting out loud between "1001" and "1030." The trooper testified that, when he instructed the Defendant to perform the test, the Defendant started and stopped five times, but each time he stood on one leg no longer than ten seconds.

Finally, Trooper Gaskill requested the Defendant perform the finger-to-nose test, which requires that the subject close his eyes, lean back, and touch his index finger to the tip of his nose, alternating between the right and left hands. Trooper Gaskill testified that, when the Defendant performed the finger to nose test, he hesitated each time the trooper asked him to touch the index finger of either his left or right hand to his nose. Also, he said the Defendant failed each time to touch his finger to his nose.

The trooper testified that, as a result of his training, experience, the presence of the partially full beer can near the truck, the Defendant's admission that he had been drinking, the Defendant's performance on the field sobriety tests, and the circumstances of the accident, he determined that the Defendant was intoxicated and arrested him for DUI. The trooper requested the Defendant to submit to a blood alcohol test, but the Defendant refused, so the trooper, reading from an "implied consent form," informed him of the consequences of such a refusal. The Defendant persisted in his refusal, and he refused to confirm his refusal in writing by indicating his refusal on and signing the implied consent form.

At the close of the Defendant's trial, the Wilson County jury convicted the Defendant of second offense DUI, failure to exercise due care, violation of the open container law, and violation of the implied consent law. The trial court sentenced the Defendant to eleven months and twenty-nine days, with seventy-five days to be served in jail and the remainder on probation.

II. Analysis

The Defendant contends the trial court erred when it admitted Trooper Gaskill's testimony about the Defendant's sobriety field tests, although he recognizes that it has been the practice of the trial courts to admit such evidence. He argues that any evidence about the Defendant's performance of the field sobriety tests should not have been admitted without the State first establishing a foundation that the Defendant's poor performance of field sobriety tests would indicate that the Defendant was under the influence of alcohol. The Defendant asserts that, without such a foundation, the relevance of a field sobriety test is not established.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "Generally all relevant evidence is admissible except as provided by ... [the] rules [of evidence]." Tenn. R. Evid. 402. The admissibility, relevancy, and competence of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for an abuse of discretion. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Gray*, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997).

Tennessee courts have consistently affirmed convictions over a defendant's challenge to a conviction based, at least in part, on a trial court's admission of testimony about performance of field sobriety tests by a defendant accused of driving under the influence. *See, e.g., State v. Donte Collins*, No. M2004-02564-CCA-R3-CD, 2005 WL 3369246, *5 (Tenn. Crim. App., at Nashville, Dec. 12, 2005), *perm. app. denied* (Tenn., May 1, 2006); *State v. Stacy R. Dowell*, No. E2002-01918-CCA-R3-CD, 2003 WL 402815, *5 (Tenn. Crim. App., at Knoxville, Feb. 24, 2003), *no Tenn. R. App. P. 11 application filed*. The Defendant asks this Court for a "sea change" in current Tennessee jurisprudence regarding field sobriety tests. However, because a driver's objective manifestations of intoxication are always relevant in a driving under the influence prosecution, we agree with the long line of Tennessee cases holding field sobriety tests to be admissible. A driver's behavior and

appearance can indicate the possibility, if not the exact level, of the driver's intoxication. The administration of a field sobriety test provides a sample of the driver's behavior for the officer and, ultimately, the trier of fact to consider when determining whether the driver was under the influence of alcohol and, if so, to what extent.

With the exception of the HGN sobriety test, field sobriety tests are not scientific tests requiring the testimony of a qualified expert pursuant to Tennessee Rule of Evidence 702. *See State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997); *State v. Gilbert*, 751 S.W.2d 454, 459 (Tenn. Crim. App. 1988) (holding that "field sobriety tests are not 'scientific tests'; and the admissibility of the results is not to be governed by rules pertaining to the admission of scientific evidence."). In *Murphy*, the Tennessee Supreme Court addressed whether the HGN sobriety test constitutes "scientific, technical, or other specialized knowledge" under evidentiary Rule 702. *Murphy*, 953 S.W.2d at 202. The *Murphy* Court concluded that the HGN test is scientific evidence requiring expert testimony. *Id.* The Court explained that "the HGN test does differ fundamentally from other field sobriety tests because the witness must necessarily explain the underlying scientific basis of the tests in order for the testimony to be meaningful to a jury." *Id.* at 202. The Court went on to say in dicta that:

Other tests, in marked contrast, carry no such requirement. For example, if a police officer testifies that the defendant was unable to walk a straight line or stand on one foot or count backwards, a jury needs no further explanation of why such testimony is relevant to or probative on the issue of the defendant's condition. A juror can rely on his or her personal experience or otherwise obtained knowledge of the effects of alcohol upon one's motor and mental skills to evaluate and weigh the officer's testimony.

Id. at 202-03.

In this case, the Defendant argues that, because an average juror would not understand how the tasks required in the field sobriety tests relate to the subject's level of intoxication, the officer proffering the testimony must first explain how the tasks show the subject's level of intoxication. This explanation, the Defendant argues, is necessary to establish the testimony's relevance under Tennessee Rule of Evidence 401.

In our view, the Defendant's argument was answered in *State v. Murphy* and its progeny. In those cases, the Tennessee Supreme Court and this Court held that the results of the field sobriety tests used in this case *are* indeed readily decipherable by an average juror, and, thus, require no additional testimony to establish the relevance of the results. *See Murphy*, 953 S.W.2d at 202-03; *Gilbert*, 751 S.W.2d at 459; *State v. Elroy D. Kahanek*, No. 01C01-9707-CC-00298, 1998 WL 345356, *4 (Tenn. Crim. App., at Nashville, June 30, 1998) (holding that "there is no doubt" that neither the walk and turn nor the one-legged stand test is scientific evidence requiring expert testimony), *perm. app. denied* (Tenn. Jan. 11, 1999); *State v. Clinton Darrell Turner*, No. 03C01-9604-CC-00151, 1997 WL 379158, *3 (Tenn. Crim. App., at Knoxville, July 9, 1997) (holding that

the finger-to-nose test is not scientific evidence requiring expert testimony), *no Tenn. R. App. P. 11 application filed*. The walk and turn, one-legged stand, and finger-to-nose tests do not require an explanation of their underlying scientific bases in order for testimony concerning them to be meaningful to a jury, and, thus, relevant. *See* Tenn. R. Evid. 401; *Murphy*, 953 S.W.2d at 202-03. We, therefore, reject the Defendant's contention that testimony explaining the connection between the tests and the subject's level of intoxication should have preceded Trooper Gaskill's testimony about the Defendant's performance of the field sobriety tests. As such, we conclude the trial court did not abuse its discretion when it admitted Trooper Gaskill's testimony. *See Dubose*, 953 S.W.2d at 652. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude the trial court did not err when it admitted evidence of the Defendant's field sobriety tests without first requiring the State to establish a foundation for the relevance of such evidence. As such, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE